Supreme Court, U.S.
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No. 91-2001

In The

Supreme Court of the United States

October Term, 1992

RICHARD VOGEL,

Petitioner,

v.

THE CITY OF CINCINNATI and
SCOTT JOHNSON, CITY MANAGER and
CIVIL SERVICE COMMISSION OF THE
CITY OF CINCINNATI and
LAWRENCE WHALEN, POLICE CHIEF OF THE
CITY OF CINCINNATI and
THE SENTINEL POLICE ASSOCIATION,

Respondents.

**Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

BRIEF OF RESPONDENTS CITY OF CINCINNATI, SCOTT JOHNSON, CIVIL SERVICE COMMISSION AND LAWRENCE WHALEN IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Whether a voluntary Consent Decree to which the City of Cincinnati is a party, the overall purpose of which is to insure equal employment opportunity for minorities and females in the City's Police Division, which is based on a history of discriminatory employment practices for minorities and females, and which contains inherently flexible goals to redress those discriminatory practices, is constitutional under the Fourteenth Amendment of the United States Constitution as applied to the Petitioner.

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STATEMENT OF THE CASE

In 1980, the Department of Justice, on behalf of the United States, commenced an action against the City of Cincinnati, the Cincinnati Police Division, and the Cincinnati Civil Service Commission (hereinafter, the City) alleging that they had engaged in hiring and promotion practices that discriminated against black and women police recruit candidates in violation of Title VII of the Civil Rights Act of 1964. On August 13, 1981, the City entered into a Consent Decree with the Fraternal Order of Police, which had intervened in the case, and with the Department of Justice. (Pet. Appendix 31A). The long term goal of the decree was to remedy any disadvantage that resulted from the City's past discrimination against blacks and women. The City agreed that the appropriate standard for determining whether this purpose has been achieved was to compare the proportion of qualified blacks and women in the labor force of the City to approximate that proportion in all the sworn ranks of the Cincinnati Police Division (hereinafter CPD). (Pet. Appendix 31A, pp. 33A-34A). In order to meet this long term goal, the City adopted an interim goal of hiring qualified black and female officers in at least the same percentages in which they were represented in the 1980 police recruit list, which at that time was 34% black and 23% women. (Pet. Appendix 31A, p. 34A).

Anytime after five years from the date of the decree, and upon a showing by the City that the long term goals of the decree were met, the City could seek termination of the decree. (Pet. Appendix 31A, p. 43A). At the time of the Petitioner's suit, the long term goals of the decree

were not met, and thus the interim goals were still in effect.

The decree's language is clear that no quotas were required. It states in relevant part that "[n]othing herein shall be interpreted as requiring the City defendants to hire unnecessary personnel, or to hire, transfer or promote a person who is less qualified over a person who is more qualified . . . " (Pet. Appendix 31A, p. 35A).

Petitioner Richard Vogel, a white male, was not selected as a member of the police recruit class that began training in October, 1989. Although he was appointed to a recruit class shortly thereafter, he commenced an action against the City seeking back pay, retroactive seniority and other benefits for the period between October, 1989 and his appointment.

Petitioner filed his original Complaint against the City in the United States District Court for the Southern District of Ohio, Western Division, on October 5, 1989. The original suit was against all the named respondents except the Sentinel Police Association, a group which represents black Cincinnati Police Officers. The Sentinel Police Association was subsequently permitted to intervene without objection.

Petitioner filed a Motion for Summary Judgment in the District Court and the City and the Intervenors responded with Cross-Motions for Summary Judgment. On April 15, 1991, the District Court denied Petitioner's Motion for Summary Judgment and granted the Respondents' Motions for Summary Judgment. (Pet. Appendix 1A). The court concluded that the Consent Decree set forth goals of hiring qualified black and female officers

and was intended to be an interim measure. The court never interpreted the decree as requiring quotas.

Thereafter, Petitioner filed a Notice of Appeal, seeking review by the United States Court of Appeals for the Sixth Circuit. Following briefing and oral argument, on March 13, 1992, the Court of Appeals affirmed the District Court's decision. (Pet. Appendix 6A). The Court of Appeals held that the Petitioner lacked standing to collaterally challenge the City's interpretation of the decree, but did have standing to challenge the City's hiring policy, adopted pursuant to the decree, as applied to him. The court also held that the "affirmative action hiring policy" adopted by the City pursuant to the decree did not violate the Equal Protection Clause of the Fourteenth Amendment. It is from the Sixth Circuit's decision that this Petition for a Writ of Certiorari was taken.

ARGUMENT FOR DENYING THE PETITION

1. The City has never set forth a hiring quota pursuant to the Consent Decree; rather, it has implemented the interim goals set forth in the decree which will end once the decree's overall goal of remedying past discrimination is met.

Petitioner argues that the affirmative action plan adopted by the City, "to the extent that it constituted a quota," is unconstitutional. (Pet., p. 18). Petitioner does not attack the Consent Decree itself, for he states quite succinctly in his Petition, "[A]s has been established, the Consent Decree did not authorize a quota," (Pet., p. 17). Since the Consent Decree itself is a valid agreement

entered with the purpose of remedying prior discrimination, the Petitioner must have established that the City's policies created a quota system. Because the Petitioner has failed in this endeavor, this Court should deny the Petition for a Writ of Certiorari.

To meet the goals for police hiring, the City has implemented for each written test given for hiring, an administrative system of three lists, one containing the test results of white males, one containing the test results of blacks and one containing the test results of females. The written test is just one step of an extensive six step process of becoming a police recruit, the entire screening procedure consisting of a written examination, physical ability test, medical examination, background investigation, psychological evaluation and the Rule of Three Process.[1]

The purpose of the written exam is to determine which applicants possess the minimum qualifications needed to be trained to be entry level police recruits. A score of 60% constitutes a passing score for all individuals including whites, blacks and females. All applicants who receive a passing score on the written exam are qualified to advance to the subsequent steps of the hiring process.

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[1] The Rule of Three is a selection method mandated by Section 124.27 of the Ohio Revised Code. The rule permits the police chief to select a candidate for hiring from the top three people on an eligible list. It does not guarantee employment to those ranking highest on a given list, but only guarantees hiring consideration. (Pet. Appendix 48A).

After the applicants successfully advance through the first five steps of the selection process, they are then placed on an eligible list and certified to the police chief for consideration for hiring and go through the Rule of Three process. All applicants, majority, minority and female, that are certified for consideration to the police chief for hiring in the Rule of Three process are qualified to be police recruits.

In an attempt to persuade this Court of the unconstitutionality of the City's hiring policies, the Petitioner uses the term "quota" liberally throughout his Petition, yet there has been no evidentiary finding that the City implemented a quota system. The Petitioner simply misstates this critical fact in an attempt to augment his claim. The City has admitted that, acting pursuant to the decree approved by the District Court in 1981, it has implemented interim *goals* for hiring blacks and women. The District Court also concluded that the decree's goals were an "interim measure." (Pet. Appendix 1A). Testimony by City Manager C. Scott Johnson and City Personnel Analyst Carol Callahan also support this conclusion. In their depositions, each stressed the differences between a goal and a quota and further testified that the City was implementing the goals of the Consent Decree by using the dual lists scheme.[2]

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[2] Mr. Johnson and Ms. Callahan also each testified that in a police recruit class hired subsequent to the class at issue in this matter, the 34% interim hiring goal for black police recruits was not met because a sufficient number of qualified blacks was not available. That evidence alone demonstrates the hiring goals of the decree are not rigid quotas.

The distinction between the City's interim goals and quotas is more than mere semantics. The Petitioner is attempting to circumvent the fact that the decree does not authorize a quota by claiming that the City "created [a quota] *outside* the Consent Decree." (Pet., p. 7) (emphasis added). Yet, the Petitioner has never shown that the City was acting outside the decree; in fact, the evidence clearly shows that the City was implementing the goals of the decree. This Court should therefore not grant Certiorari.

2. The City's affirmative action plan, created pursuant to the goals set forth in the Consent Decree, does not violate the Equal Protection Clause of the Fourteenth Amendment.

In *Martin v. Wilks*, 490 U.S. 755 (1989), this Court held that people who are not made parties to a consent decree have standing to commence an action challenging the constitutionality of the decree as applied to them. *Id.* at 762. Even though the Petitioner admits that the Consent Decree does not establish a quota, he still claims that the City's affirmative action plan, made pursuant to the goals of the decree, violates the Equal Protection Clause.

Petitioner argues that race or sex based affirmative action plans must be subjected to "strict scrutiny" review. While this Court has subjected race-conscious affirmative action plans to strict scrutiny review in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion), gender based classifications have not been subjected to this type of review. Instead, this Court has subjected gender based classifications to a different level

of scrutiny. *Craig v. Boren*, 429 U.S. 190, 198 (1976) ("[C]lassifications by gender must serve important government objectives and must be substantially related to achievement of those objectives."). *See also Wengler v. Druggist Mutual Ins. Co.*, 446 U.S. 142 (1980). This type of scrutiny, often referred to as "mid-level" or "intermediate," "is regarded as a less stringent judicial standard of review than 'narrowly tailored to serve a compelling interest'." *Associated General Contractors of California v. San Francisco*, 813 F.2d 922, 939 (9th Cir. 1987).

A. The City's affirmative action plan with respect to the hiring of black police officers is intended to remedy identifiable prior discrimination by the City, and this compelling governmental interest is met by narrowly tailored goals.

Any racial classification must be justified by a compelling governmental interest. *Wygant*, 476 U.S. at 274. A state or local government unquestionably has a compelling interest in remedying past and present discrimination by a state actor. *Id.* at 286. The level of scrutiny does not change merely because the challenged classification works against a group that historically has not been subject to governmental discrimination. *Croson*, 488 U.S. at 494. This Court has previously upheld affirmative action plans intended to remedy identifiable prior discrimination by public police and fire agencies. *United States v. Paradise*, 480 U.S. 149 (1987); and *International Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 510 (1986).

Although Congress may identify and redress the effects of society-wide discrimination, a city must have a "strong basis in evidence for its conclusion that remedial action was necessary." *Wygant*, 476 U.S. at 277. This Court has stated, "[A]n amorphous claim that there has been past discrimination in a particular industry . . . " is not enough. *Croson*, 488 U.S. at 499. However, evidence of wide statistical disparities may justify an affirmative action policy adopted by a public employer. *Wygant*, 476 U.S. at 274-275 (citing *Hazelwood School District v. United States*, 433 U.S. 299, 307-308 (1977)). Where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task. *Hazelwood*, 433 U.S. at 308. Therefore, by using a pool of qualified minorities to show evidence of wide statistical disparities, a city may adopt an affirmative action plan in order to remedy such prior discrimination, and the city will thus meet its burden of showing a compelling governmental interest under the strict scrutiny analysis.

The Consent Decree herein specifically sets forth the type of statistical evidence to be used by the City in order to determine the longevity of the affirmative action plan. It states:

> The City defendants have agreed that in determining whether this purpose has been achieved, an appropriate standard of comparison is the proportion of qualified blacks and women in the labor force of the City of Cincinnati. . . .

(Pet. Appendix 31A, p. 33A). This Court has previously found that the relationship of numerical goals to the

relevant labor market was one factor to look at in determining whether a race-conscious affirmative action plan was appropriate. *Paradise*, 480 U.S. at 171 (1987).

Here, the City, specifically the CPD, was shown to have discriminated in the hiring and promotion of black police officers. In coming to this conclusion, an analysis was made between the statistical discrepancies of the number of blacks in the applicant pool from which the police force was selected and the racial composition of the City police force. Vivian Toler, a statistical expert, made a statistical analysis according to the binomial approximation model adopted by the Supreme Court in *Castaneda v. Partida*, 430 U.S. 482, 496-497, n.17 (1977); and *Hazelwood*, 433 U.S. at 308-309, n.14. Under this model, a difference of more than two or three standard deviations allows an inference that race had played a role in the City's hiring or promotion policies. *Hazelwood*, 433 U.S. at 309, n.14 (quoting *Castaneda*, 430 U.S. at 497, n.17). The disparity between the expected rate of black appointments and the actual rate was 4.7 standard deviations. The disparity between the expected and actual members of blacks on the police force was 12.5 standard deviations. The disparity between the expected and actual numbers of promotions of blacks to sergeant's positions was 2.6 standard deviations. (Pet. Appendix 21A, 28A).

The parties to the Consent Decree did not, as the Petitioner suggests, rely on statistical comparisons with the general workforce of the City of Cincinnati. Rather, they compared the composition of the City's police force with the applicant pool from which it was selected, a practice which is in accord with this Court's requirement

that the relevant statistical pool must be from those qualified to undertake a particular task. *See Hazelwood*, 433 U.S. at 308.

The Court of Appeals below concluded that the statistical technique met the *Hazelwood* test. The court cited a prior Sixth Circuit decision stating, "[I]t is only when the statistics disclose the availability of *minorities in the relevant labor pool* substantially exceeded those hired that an inference of deliberate discrimination in employment may be drawn." *Vogel v. City of Cincinnati*, 959 F.2d 594, 600 (6th Cir. 1992) (citing *Long v. City of Saginaw*, 911 F.2d 1192, 1202 (6th Cir. 1990) (emphasis added by *Vogel*). The Seventh and Eighth Circuits have similarly adopted comparisons with the relevant applicant pool. *See Billish v. City of Chicago*, No. 90-1650, No.90-2182, 1992 U.S. App. LEXIS 9262 (7th Cir. 1992); and *Donaghy v. City of Omaha*, 933 F.2d 1448 (8th Cir. 1991).

The statistical analysis relied upon by the parties to the Consent Decree clearly showed that there had been discrimination in the hiring and promotion of blacks within the CPD. As such, the City had a compelling interest to remedy such discrimination, and pursuant to the Consent Decree, it implemented interim goals for hiring.

An affirmative action plan implemented to *attain* a racially balanced work force, as opposed to a plan to *maintain* such a force, is more likely to pass Constitutional muster. *See Johnson v. Transportation Agency*, 480 U.S. 616, 639 (1987). Likewise, assurances that a consent decree is

temporary in duration might be necessary if an affirmative action program is in effect. *International Ass'n of Firefighters*, 478 U.S. at 510.

The City's hiring plan is intended to attain, rather than maintain, a racially balanced workforce, and once the long term goals of the Consent Decree are met, the City will seek termination of the decree. As the District Court found, the CPD has not yet attained a racially balanced workforce; therefore, the affirmative action plan must remain in effect in order to meet the long term goals of the decree. (Pet. Appendix 1A).

The means chosen by the State to effectuate its compelling governmental interest must be narrowly tailored. *Wygant*, 476 U.S. at 274. In order to remedy the effects of prior discrimination, it may be necessary to take race into account. *Id.* at 280. Once an employer has shown a prima facie case of discrimination, the employer is free to adopt an affirmative action plan. *Johnson*, 480 U.S. at 634, n.11. As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. *Id.* at 280-281. Hiring *goals* are a narrowly tailored means of remedying past discrimination. *Id.* at 283-284 (emphasis added). In cases involving hiring goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. *Id.* at 282. Hiring goals do not impose the same type of intrusive injuries that layoffs, which result in loss of job expectancy, security, and seniority, involve. *Id.* at 283. Furthermore, "[t]he ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative action program." *Wygant*, 476 U.S. at 277-278. Therefore, an affirmative

action plan which implements hiring or promotion goals, and does not implement a blind racial quota or other drastic means such as non-minority layoffs, is narrowly tailored to remedy prior discrimination.

The City's affirmative action plan implements the interim hiring goals established by the Consent Decree. It does not "unnecessarily trammel the interests of the white workers" nor does it create "an absolute bar to the advancement of white employees." *Johnson*, 480 U.S. at 630 (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979)). Although it might burden some innocent individuals, it does not impose the intrusive injuries that layoffs or blind racial quotas would impose. It is merely a temporary means to remedy identifiable discrimination and attain a racially balanced workforce. For example, the Petitioner, although denied a spot on the October, 1989 recruit class, was appointed to a recruit class shortly thereafter. This type of burden is minimal when compared to the compelling governmental interest of remedying prior discrimination. In this case, the government's compelling need to employ a race conscious remedy outweighs the unfairness to innocent individuals. *See Fullilove v. Klutznick*, 448 U.S. 448, 515 (1980).

The Petitioner argues that the City's hiring goals were arbitrary and completely unrelated to any prior discrimination. In *Paradise*, 480 U.S. at 149, this Court rejected a similar argument where a "one-for-one" promotional requirement was argued to be arbitrary. This Court responded that the argument ignored the fact that the one-for-one requirement is not itself the [long term] goal, but rather an interim goal which represented the speed at which the long term goal was to be achieved. *Id.*

at 180. Similarly, the interim goals implemented by the City are not ultimate goals of the plan; rather, they are short term vehicles for achieving the long term goals of the Consent Decree, namely to remedy any disadvantage from prior racial discrimination and to attain a racially balanced workforce.

The City has thus demonstrated through the use of statistics that there has been prior discrimination in the hiring and promotion of blacks in the CPD. Because this evidence establishes a prima facie case of discrimination, the City is entitled to adopt an affirmative action plan. The City has a compelling interest to remedy the identified discrimination, and it has chosen to do so by implementing the interim goals of the Consent Decree. These interim goals are narrowly tailored and do not place an unjust burden on non-minority candidates. Thus, the City's affirmative action plan does not violate the Equal Protection Clause.

B. The City's affirmative action plan with respect to the hiring of women police officers is intended to remedy identifiable prior discrimination by the City and is clearly a justified gender based classification.

Although Petitioner is a white male challenging the City's hiring policies under the Consent Decree primarily on the basis of alleged "racial quotas," in his Petition he also claims the City's gender based hiring practices are unconstitutional. Classifications by gender must serve important government objectives and must be substantially related to achievement of those objectives. *Craig,*

429 U.S at 198. Remedying prior discrimination is surely an important governmental objective, for this Court has determined that it is a compelling governmental interest under the highest level of scrutiny. *See Wygant*, 476 U.S. at 274-275. Likewise, interim hiring and promotion goals intended to remedy such discrimination, having been found to meet the "narrowly tailored" prong of this Court's strict scrutiny analysis for race based classifications, are easily deemed substantially related under this Court's intermediate scrutiny analysis for gender based classifications.

The City has shown beyond doubt discrimination in the hiring and promotion of women in the CPD. The Joint Stipulations entered by the United States and the City of Cincinnati unequivocally demonstrate that the City discriminated in the hiring and promotion of women. The City limited women to ten positions with the CPD; required more education of female than male applicants for entry level positions with the CPD; prevented women from achieving a rank above police specialist; and assigned women exclusively to the juvenile division of the CPD. As of July, 1980, only 3.4% of the sworn force of the Cincinnati Police Department were women while women constituted 22.8% of the applicants for the force during the period from 1974 to February, 1980. (Pet. Appendix 21A, 28A).

In *Johnson*, 480 U.S. at 616, this Court decided on the constitutionality of an affirmative action plan intended to cure the limited opportunities that existed for women to find employment in certain job classifications where women were not traditionally employed in significant numbers. The plan sought to remedy these imbalances

through "hiring, training and promotion of . . . women throughout the Agency in all major job classifications where they are underrepresented." *Id.* at 634. The Agency thus adopted annual short term hiring and promotion goals that would eliminate this underrepresentation and would lead to the long term goal of a more representative work force. *Id.* at 635. The affirmative action plan stressed that these goals "should not be construed as 'quotas' that must be met, but as reasonable aspirations in correcting the imbalance in the Agency's work force." *Id.* at 635. Furthermore, the plan in no way required the Agency to hire unqualified women, for if it did, the plan would "dictate mere blind hiring" and as such, "its validity could fairly be called into question". *Id.* at 636.

With respect to women, the City's affirmative action plan is clearly justified. The prior discrimination against women has been amply shown from the Joint Stipulations entered between the City and the United States. Remedying such discrimination, as well as attaining a representative police force, are important government objectives. The interim hiring goals of the Consent Decree are substantially related to meet these objectives. Like the affirmative action plan in *Johnson*, the hiring plans are temporary and are intended to lead to the long term goals set forth in the Consent Decree. In addition, the interim goals are not quotas nor did they require the City to hire unqualified women in order to meet the long term objectives of the decree. Finally, the reason the interim goals are still in effect is because the decree's long term objectives have not been met.

CONCLUSION

For the foregoing reasons, Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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